In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 896

JOSEPH ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

During 1958 two federal indictments were filed against petitioner in New York, one charging him with attempted evasion of his personal income taxes for the years 1951 and 1952, and the second charging him with evasion of corporate income taxes for the same years (R. 58a, 73a, 105a, 139a–142a). A third federal indictment, filed in New Jersey, charged petitioner and two other persons with evasion of the taxes of still another corporation for the year 1951. *United States* v. *Kravitz*, 281 F. 2d 581 (C.A. 3). Not long prior to the return of these three indictments, petitioner had been found guilty of stealing property of the United States

213-598—66

and had been sentenced to imprisonment for 30 months. This conviction was ultimately affirmed on appeal, and this Court denied certiorari. See *United States* v. *Fabric Garment Co.*, 262 F. 2d 631 (C.A. 2), certiorari denied, 359 U.S. 989. In October, 1959, petitioner pleaded guilty to two counts involving tax evasion for the year 1952 charged in the New York indictments (R. 12a, 58a, 73a, 118a). Although petitioner protested that he did not owe the *full* amount of tax deficiencies then being asserted by the government, it is clear that he did intend to admit, by his guilty pleas, that he had evaded a *substantial* amount of taxes (R. 14a, 61a). He was sentenced to imprisonment for two years, to run concurrently with the 30 months stolen property sentence he was already serving, fined a total of $20,000, and the remaining seven counts of the two New York indictments were dismissed (R. 118a).[1]

On October 14, 1964, after his release from prison, petitioner instituted the present proceeding by filing, in the Eastern District of New York, a motion to set aside his guilty pleas and conviction, which the court treated as a petition for a writ of error *coram nobis* (R. 57a, 119a). Petitioner asserted that the conviction was a manifest injustice since he was able to show that neither he nor the corporations had any substantial tax deficiencies for the years involved in the indictments (R. 58a-64a). In support of this contention he submitted a letter and three reports

[1] As to the third indictment in New Jersey, petitioner obtained a severance and testified for the government against his co-defendant Kravitz (R. 59a). The case against petitioner was ultimately dismissed.

prepared by Internal Revenue Agent Harry Blacher, who had participated in the original investigation in 1952–1953, and who had now concluded, after further investigation during 1963–1964, that there was no substantial understatement of taxes and no fraudulent conduct on the part of petitioner (R. 65a–71a).

The government opposed petitioner's motion (R. 83a–86a), and submitted in support an affidavit by Agent Blacher in which he admitted that, when first assigned to the case in 1952, he had recommended a refund upon the basis of books and records submitted by petitioner (R. 88a–89a); that, after Intelligence Agents joined the investigation, he reversed himself and recommended assessment of large tax deficiencies on the basis of evidence developed by the Intelligence Agents (R. 88a–89a); that, as a result of his supplemental investigation begun in 1960, he submitted additional reports again reversing himself and finding no substantial deficiencies, relying solely upon unverified documents submitted to him by petitioner[2] (R. 89a–94a); and that he had forwarded these documents to the revenue officials who were to review his supplemental reports (R. 93a, 94a). The revenue officials who reviewed Blacher's supplemental reports submitted affidavits to the effect that no supporting documents accompanied the reports (R. 96a–98a). The Intelligence Agents, who had worked with Blacher in the original investigation and had then

[2] During the original investigation petitioner insisted that some of these documents had been destroyed by fire (R. 109a). He now explained that he had not produced them at that time because they would have incriminated Kravitz (R. 95a).

recommended prosecution of petitioner, submitted affidavits to the effect that, in 1964, Blacher asked them to reverse their finding of fraud; that they refused to do so; and that Blacher's supplemental reports contained no evidence which would cause them to alter their original recommendations (R. 108a–113a).

The district court concluded that petitioner had failed to establish his right to relief and denied the motion to vacate the conviction (Pet. 34–39; R. 118a–123a). The court of appeals affirmed (Pet. 30–33).

The instant petition for a writ of certiorari, filed January 10, 1966, would appear to be out of time. The judgment of the court below was entered on October 21, 1965 (Pet. 30), and, since a *coram nobis* proceeding "is a step in the criminal case," *United States* v. *Morgan,* 346 U.S. 502, 505, fn. 4, the petition should have been filed within 30 days. By the same test, the appeal itself was untimely, for the order of the district court was entered on December 10, 1964 (Pet. 39; R. 123a), and the notice of appeal was not filed until March 19, 1965, long after the 10 days allowed by Rule 37(a)(2), Federal Rules of Criminal Procedure. In any event, the petition is without merit.

Relief by *coram nobis* should be granted only for errors of the "most fundamental character." *United States* v. *Morgan,* 346 U.S. 502, 509, 512. "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under

circumstances compelling such action to achieve justice." *United States* v. *Morgan*, 346 U.S. at 511. Petitioner's request for vacation of his guilty pleas and conviction rests upon two contentions: (1) that at the time of plea and sentence he was "unable and powerless" to present a defense (Pet. 1, 3, 25; R. 59a–61a); and (2) that the Internal Revenue Service has now officially admitted that he had no substantial tax deficiencies for the years involved in the indictments (Pet., passim; R. 61a–64a). We submit that petitioner failed to make any showing of manifest injustice, and that the district court correctly concluded (Pet. 39; R. 123a) that he had failed to establish his right to the relief sought.

(1) There is nothing in the record to support petitioner's assertion that he was forced to plead guilty because the circumstances prevented adequate preparation for trial. Petitioner states (Pet. 3) that, at the time of the guilty pleas in October 1959, he was already incarcerated on the earlier stolen property conviction. But the first of the three income tax indictments was returned in March 1958, and petitioner admits that he did not go to jail on the stolen property charge until after this Court had denied certiorari in May 1959 (R. 60a). He thus had ample time to collect pertinent documents and to prepare a defense.

Nor can it be claimed that petitioner did not understand the import of his guilty plea. As an accountant he was well versed in financial affairs. He was represented by competent counsel and had, in another

criminal case pending at about the same time, fully prosecuted his legal rights by taking an appeal from his criminal conviction and then applying to this Court for a writ of certiorari. Moreover, it is apparent that petitioner consciously decided that it would be to his advantage to plead guilty to one count each from the two federal indictments in New York and to cooperate with the government in the prosecution of Kravitz on the federal indictment in New Jersey, for the latter indictment was ultimately dismissed as to him as were the seven other counts in the two New York indictments. Finally, petitioner undoubtedly understood that his guilty pleas constituted an admission that he had evaded a substantial amount of tax (R. 14a, 61a).

(2) Nor has petitioner shown that there was no substantial tax deficiency for 1952, the year for which he pleaded guilty of tax evasion. Although Revenue Agent Blacher's 1963–1964 reports indicate that there was no tax due for 1952 and the Internal Revenue Service, in reliance upon these reports, refunded to petitioner the amounts it had collected from him after his guilty plea, Blacher conceded in his affidavit that his reports were based solely upon unverified documents submitted to him by petitioner (R. 89a–95a). Affidavits from the Intelligence Agents who had worked on petitioner's case show that the documents relied upon by Blacher were patently insufficient to prove that petitioner had no substantial

deficiency for 1952 (R. 108a–113a). Judge Rayfiel found (Pet. 37):

> Blacher admitted that in making such supplemental audit he made no effort to verify the authenticity of the documents submitted to him in connection therewith, although he knew that the audit involved returns which were the basis of the counts of the aforementioned indictments to which the defendant had pleaded guilty. He accepted, and acted upon, records, documents and representations by the defendant without verification or substantiation by bank statements, cancelled checks, or otherwise.[3]

Blacher also admitted that he had at one time purchased stock in a corporation in which petitioner had an interest (R. 94a–95a). Moreover, the Assistant United States Attorney who prepared the government's answer stated that he found Blacher "very difficult to work with * * * evasive and equivocal" (R. 84a). Although not shown in the record, Internal Revenue Service files disclose that Blacher resigned from the Service during an investigation of his conduct in this case and that the Service has rescinded all action taken in reliance on Blacher's reports and is now attempting to re-collect substantial deficiencies from petitioner for 1952.

Judge Rayfiel, who had imposed sentence upon petitioner and who was thus thoroughly familiar with

---

[3] Furthermore, it was apparent that petitioner had told conflicting stories about the existence of these documents and his reason for not relying upon them instead of pleading guilty. See *supra*, p. 3, fn. 2.

the background of the case, properly decided (Pet. 37–39) that action taken by the Service in reliance on Blacher's reports would not justify the conclusion that petitioner's previous plea of guilty had been a manifest miscarriage of justice. As this Court held in the *Morgan* case, relief by *coram nobis* should be granted only under compelling circumstances. Certainly, in the circumstances of this case, the trial court was entitled to deny such extraordinary relief where it had concluded that petitioner's evidence was insufficient to show that there was actually no substantial 1952 deficiency. As the court of appeals stated, petitioner's allegations depend solely on Blacher's questionable reports, "not on any showing of the existence of any solid underlying proof" (Pet. 33). In the absence of such a showing, the district court was not required to hold a further hearing. See *Taylor* v. *Alabama*, 335 U.S. 252, 261–263, 271–272; *United States* v. *Campbell*, 278 F. 2d 916, 918–919 (C.A. 7); *Bateman* v. *United States*, 277 F. 2d 65, 67–68 (C.A. 8).[4]

[4] Petitioner also complains that the district court failed to make available to him certain files of the Internal Revenue Service relating to audits and refund claims of petitioner and his corporations. At the hearing petitioner's attorney stated that he merely wanted the files "placed in the possession of the Court, not in my possession"; "I want the Court to have them. I am not interested in looking at them" (R. 34a, 31a). The district court complied with this request (R. 53a–55a, Pet. 17), and petitioner cannot now complain that the district court did not afford him relief he did not request.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

APRIL 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966